

1. Did claimant suffer personal injury by accident which arose out of and in the course of her employment with respondent? Respondent argues that there were no witnesses to either of claimant's alleged accidents and claimant was not even sure of the exact dates of the incidents alleged. Claimant argues that her description of the accidents is basically uncontroverted. Additionally, claimant reported the incidents immediately to her supervisor and was referred for medical treatment shortly thereafter. Claimant also testified that accident reports were created. (But none were contained in this record.) The parties agreed at oral

argument to the Board that claimant did not suffer a series of accidents. If claimant was injured, it was the result of two separate traumatic injuries.

2. What is the appropriate date or dates of accident in this matter? Claimant originally alleged she suffered an injury on May 16, 2008, and a series of mini-traumas thereafter until June 25, 2008, when the ALJ determined she suffered a second trauma as a series.<sup>1</sup> Respondent contends that claimant has failed to provide any medical proof that her condition worsened over the course of time and, at best, claimant suffered two separate traumatic incidents. However, as claimant cannot identify the dates of injury alleged with any accuracy, respondent disputes whether the accidents even occurred.
3. What is claimant's average weekly wage (AWW) for the date or dates in question? Respondent argues that claimant testified that her employment with respondent began either in December 2007 or January 2008. However, Claimant's Exhibit 4 to the Regular Hearing, a detailed printout of claimant's earnings provided by respondent, supports claimant's argument that her employment began on February 25, 2008. The parties stipulated at oral argument to the Board that, if claimant's employment began on February 25, 2008, then the wage calculations used by the ALJ in the award are accurate.
4. Is claimant entitled to temporary total disability (TTD) compensation for the period from June 25, 2008, through August 12, 2008? Respondent contends claimant was off work due to a personal illness. Claimant contends her absence from work was due to a knee injury suffered during the May 16, 2008, accident and the resulting medical care for that injury.
5. What is the nature and extent of claimant's injuries and disability from these accidents? Dr. Murati, claimant's expert, assessed claimant a 13 percent whole body functional impairment for the injuries suffered while working for respondent. Dr. Estivo, respondent's expert, assessed claimant a 5 percent impairment to the whole body, but later recanted after watching a DVD of claimant's physical activities. The ALJ also awarded claimant a work disability as noted above.

#### **FINDINGS OF FACT**

Claimant, a CNA since 1989, began working for respondent on February 25, 2008. Respondent contends that claimant's start date was before that, as claimant testified at

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<sup>1</sup> Claimant testified that this second accident occurred about two weeks after the May 16, 2008, accident (which would be approximately May 30). (See R.H. Trans. at 13) Regarding June 25, that is when claimant was taken off work. It was stipulated at oral argument to the Board that claimant now alleges that she suffered two separate accidents and not a series of microtraumas.

regular hearing that as of May 2008, she had been working for respondent for “a little over five months.”<sup>2</sup> But wage records, placed into evidence after being provided by respondent, show a start date on February 25, with no other contradictory evidence in this record. If respondent had additional information regarding claimant’s AWW, which would verify claimant’s start date, it would be respondent’s obligation to provide such wage information pursuant to K.A.R. 51-3-8(c).

Claimant testified that on or about May 16, 2008, she was assisting a resident put on socks. While doing so, claimant fell over on her left side onto a hard tile floor. There was no witness to this accident. However, claimant testified that she informed her nurse in charge, Sharon Hoover, of the accident and was sent to Via Christi Occupational and Environmental Medicine, where she was examined by Daniel V. Lygrisse, M.D. Claimant was prescribed medication and home exercises and returned to work with restrictions, which respondent honored for the remainder of claimant’s employment term. It should be noted that the wage records stipulated into this record by the parties indicate that claimant did not work on May 16, 2008, but did work on May 14 and 15, 2008. It is alleged by claimant that accident reports were prepared for each of claimant’s alleged accidents. However, there are no accident reports contained in this record. The record also conflicts as to whether claimant was assisting a resident with socks, or squatting to change a Foley bag or squatting to help a resident use the commode. All of these different descriptions are contained in this record in some form or another.

Claimant continued working for respondent in the restricted work, when, approximately two weeks after the first accident, she suffered another accident.<sup>3</sup> Again, there is conflicting evidence as to exactly how and when this second incident occurred. But, claimant again notified her supervisor and was again sent for medical treatment. When claimant was examined by Dr. Lygrisse on June 2, 2008, she advised him that she had suffered an accident over the previous weekend, which would have been Memorial Day weekend. The wage records verify that claimant worked on May 30, 2008, the Friday before her examination by Dr. Lygrisse. Claimant continued working the light-duty job.

Claimant testified that her husband was in an automobile accident on June 6, 2008, and she requested time off to care for him. The wage records verify that claimant worked on June 5, 2008, and not again until June 13, 2008. When claimant returned to work, she remained on the accommodated job. Claimant was next examined by Dr. Lygrisse on June 18, 2008. At that time, Dr. Lygrisse read an MRI of claimant’s left knee as indicating a suspicious growth. It was not believed to be connected to claimant’s work injuries, so she was advised to visit her primary care doctor regarding the MRI.

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<sup>2</sup> R.H. Trans. at 9.

<sup>3</sup> Claimant suffered that second accident on approximately May 30, 2008.

Dr. Lygrisse also noted that as of June 18, 2008, claimant's symptoms in her back and hip had resolved.

Claimant went to her primary care physician, Craig R. Parman, M.D., for an examination of her left knee and was then referred to Kimberly Templeton, M.D., on July 10, 2008. Dr. Parman took claimant off work from June 28, 2008, to July 25, 2008. It was determined that the growth on claimant's leg was not the cause of claimant's pain and she was returned to work by Dr. Parman on July 26, 2008. However, respondent refused to return claimant to work absent a release from the authorized treating physician. Shortly thereafter, claimant was examined and released by Dr. Lygrisse and was returned to work. Claimant testified that the return to work was on August 12, 2008. However, the wage records stipulated into evidence show claimant returning to work on August 7, 2008, for 2.5 hours and on August 8, 2008, for 6.75 hours. Claimant remained at the accommodated job. During her time away from work, claimant assisted in the care of her husband.

On August 12, 2008, claimant returned to Larry K. Wilkinson, M.D., complaining of low back and left hip pain. Claimant was referred to board certified orthopedic surgeon John P. Estivo, M.D., for an evaluation on September 3, 2008. Dr. Estivo ordered x-rays of claimant's lumbar spine which were read as normal. A previous MRI from July 23, 2008, displayed no abnormalities other than mild degenerative disc disease in the lumbar spine. The history provided to Dr. Estivo indicated that claimant had suffered two injuries while working for respondent. Dr. Estivo diagnosed claimant with lumbar radiculopathy and left hip greater trochanteric bursitis. He restricted claimant from lifting more than 20 pounds and limited her bending, twisting and stooping to no more than one-third of the full workday. Dr. Estivo last examined claimant on November 24, 2008. At that time, she was no longer having left hip pain, but the lumbar pain remained. He rated claimant at 5 percent to the whole body for the lumbar strain, pursuant to the fourth edition of the *AMA Guides*.<sup>4</sup> When asked, Dr. Estivo admitted that he had never identified claimant as a malingerer or symptom magnifier. He also never saw any drug-seeking behavior on claimant's part. However, after being shown a DVD of claimant's activities, and being provided medical reports which indicated that Dr. Lygrisse had released claimant on June 18, 2008, with her low back pain resolved, Dr. Estivo determined that claimant had no lumbar impairment from the injuries suffered while working for respondent. Dr. Estivo opined that the low back pain claimant was experiencing on August 12, 2008, when being examined by Dr. Wilkinson was not due to something which happened at work.

On September 23, 2008, claimant missed work due to a broken tooth. Claimant failed to provide 24 hours notice of the absence, in violation of company policy. A meeting was held on September 24, 2008, at which time claimant was given a final warning about her attendance problems. Claimant missed no work through February 5, 2009. However,

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<sup>4</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

on that day, claimant was having pain from a tooth that had been recently pulled. Claimant again failed to provide the 24 hours notice of her absence on February 6, 2009. As the result, claimant was terminated from her position with respondent. Claimant filed for and was granted unemployment compensation. Claimant began looking for work and, as of the regular hearing, continued to seek employment.

Claimant was referred by her attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an examination on March 10, 2009. Claimant was diagnosed with degenerative disc disease at L3-4 and L2-3. Claimant also had left trochanteric bursitis in the left hip. Dr. Murati found claimant's injuries to be the result of a series of accidents from approximately May 16, 2008, through June 25, 2008, and all associated with claimant's job with respondent. However, as noted above, the parties have stipulated that if claimant was injured, it was the result of two traumatic injuries and not a series. He restricted claimant from lifting, carrying, pushing or pulling over 20 pounds and limited her walking to frequent, her sitting, standing, climbing stairs, climbing ladders and squatting to occasional, her bending, crouching and stooping to rarely and prohibited crawling entirely. Claimant was rated pursuant to the fourth edition of the *AMA Guides*<sup>5</sup> at 10 percent for the low back pain under the DRE category II and 7 percent to the left lower extremity for the left hip condition, which converts to a 3 percent whole person impairment. These combine for a 13 percent whole person functional impairment. Dr. Murati was asked to review a task list prepared by vocational expert Jerry Hardin. Dr. Murati opined that claimant had lost the ability to perform 14 of 20 tasks for a 70 percent task loss. At a second deposition, Dr. Murati was provided the task list of vocational expert Dan Zumalt. Dr. Murati opined that claimant had lost the ability to perform 14 of 32 tasks for a 44 percent task loss.

#### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>6</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>7</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

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<sup>5</sup> *AMA Guides* (4th ed.).

<sup>6</sup> K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

<sup>7</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>8</sup>

The two phrases “arising out of” and “in the course of,” as used in K.S.A. 44-501, et seq.,

... have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase “in the course of” employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer’s service. The phrase “out of” the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”<sup>9</sup>

Claimant alleges two distinct accidents. While this record is clouded regarding the exact dates and activities leading to the resultant injuries, claimant’s testimony that she suffered these accidents is largely uncontradicted.

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.<sup>10</sup>

The Board acknowledges that claimant has described more than one possible accident scenario. It is determined that claimant has, in all likelihood, described several incidents which occurred during her employment with respondent. The Board is persuaded that the specific incidents described by claimant, which were reported to respondent and for which accident reports were prepared, did occur as claimant described. Claimant identified the person to whom the incidents were reported and claimant was referred immediately for medical treatment. The identified nurse, Sharon Hoover, did not testify in this matter. The Board finds that claimant suffered an accidental injury which arose out of and in the course of her employment with respondent on May 15, 2008 (rather than on May 16, 2008), and another accidental injury which arose out of and in the course of her employment on May 30, 2008.

The Board finds that claimant’s employment began on February 25, 2008. While claimant did testify that her employment started approximately five months before the May accident, the documents provided by respondent and entered as evidence at the regular

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<sup>8</sup> K.S.A. 2007 Supp. 44-501(a).

<sup>9</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

<sup>10</sup> *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

hearing verify claimant's February 25, 2008, start date. As the parties have stipulated that the calculations of the ALJ in the Award are accurate for a start date of February 25, 2008, those calculations, showing an AWW of \$624.72, are adopted by the Board and will be utilized in the calculation of this award.

K.S.A. 44-510c(b)(2) states:

Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

Claimant alleges entitlement to TTD for the period from June 25, 2008, through August 12, 2008. However, wage records verify that claimant was working through June 27, 2008, and returned to work on August 7, 2008. Additionally, claimant was off work during the remaining period through July 26, 2008, while being treated for a personal condition in her leg. The concern was that claimant had cancer in the leg, a non-work-related condition. Claimant would not be entitled to TTD during that period as the condition did not meet the requirements of the statute. However, when Dr. Parman released claimant to work effective July 26, 2008, claimant was prohibited from doing so by respondent until a release from the treating physician was obtained. Claimant was off work from July 26, 2008, through August 6, 2008, awaiting that release, a period of 1.71 weeks. The Board finds that claimant is entitled to TTD during that period as she was rendered incapable of returning to substantial and gainful employment due to respondent's rules dealing with workers compensation claims.

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>11</sup>

Claimant was rated by Dr. Estivo at 5 percent to the whole person for the lumbar injury. However, when presented with the DVD and Dr. Lygrisse' report, Dr. Estivo determined that claimant had suffered no impairment, even though he acknowledged that

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<sup>11</sup> K.S.A. 44-510e(a).

claimant's activities on the DVD violated none of his earlier restrictions. This determination was reached absent any additional evaluation of claimant by Dr. Estivo. The Board finds this determination to be somewhat disingenuous. Dr. Estivo's concern is understandable, but the severity of his reaction is not persuasive to the Board. The opinion of Dr. Estivo that claimant has no functional impairment in this matter is rejected. The Board finds the impairment opinion of Dr. Murati that claimant has suffered a 13 percent whole person functional disability should be adopted. As Dr. Murati did not separate the impairments between the two accident dates in this matter, the Board finds that claimant's permanent impairment stems from the May 30, 2008, date of accident.

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.<sup>12</sup>

Claimant has been unable to obtain employment since the termination of her job with respondent on February 6, 2009. Pursuant to the recent Kansas Supreme Court case of *Bergstrom*,<sup>13</sup> the Board will use claimant's actual post-accident earnings and find claimant has suffered a wage loss of 100 percent as of that date.

There are two task loss opinions in this record, both from Dr. Murati. The ALJ determined that a split of the opinions was appropriate. The Board agrees. However, with task loss opinions of 70 percent and 44 percent, a split would calculate to 57 percent. The Board modifies the award of the ALJ accordingly. In combining the task loss of 57 percent with a wage loss of 100 percent, the Board finds that claimant has suffered a permanent partial general disability of 78.5 percent.

### CONCLUSION

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to find that claimant suffered accidental injuries which arose out of and in the course of her employment with respondent on May 15, 2008, and May 30, 2008. As the result, claimant has suffered a permanent partial functional disability of 13 percent to the whole body and a 78.5 percent permanent partial general disability, with both the functional impairment and general disability being assessed against the May 30, 2008, date of accident.

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<sup>12</sup> K.S.A. 44-510e.

<sup>13</sup> *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

The record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant for approval.<sup>14</sup>

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated December 30, 2009, should be, and is hereby, modified to find that claimant suffered accidental injuries which arose out of and in the course of her employment with respondent on May 15, 2008, and May 30, 2008, with the permanent impairment and disability awards being assessed from the May 30, 2008, date of accident. Claimant is entitled to a 13 percent whole person functional impairment through her last day worked with respondent, followed by a 78.5 percent permanent partial general disability commencing February 6, 2009.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Christy L. Fulton, and against the respondent, Haysville Health Care Center, and its insurance carrier, Premier Group Insurance Company, for accidental injuries which occurred on May 15, 2008, and May 30, 2008, and based upon an average weekly wage of \$624.72.

Claimant is entitled to 1.71 weeks of temporary total disability compensation at the rate of \$416.50 per week totaling \$712.22, followed by 35.86 weeks of permanent partial disability compensation at the rate of \$416.50 per week totaling \$14,935.69 for a 13 percent whole person functional impairment. Then, commencing on February 6, 2009, claimant is entitled to permanent partial disability compensation at the rate of \$416.50 per week not to exceed \$100,000.00 for a 78.5 percent work disability.

As of April 19, 2010, there would be due and owing to claimant 1.71 weeks of temporary total disability compensation at the rate of \$416.50 per week totaling \$712.22, plus 96.72 weeks of permanent partial disability compensation at the rate of \$416.50 per week totaling \$40,283.88, for a total due and owing of \$40,996.10, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$59,003.90 shall be paid at the rate of \$416.50 per week until fully paid or until further order from the Director.

**IT IS SO ORDERED.**

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<sup>14</sup> K.S.A. 44-536(b).

Dated this \_\_\_\_ day of April, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Garry L. Howard, Attorney for Claimant  
Terry J. Torline, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge